5245#65
UNI-WEN

Office - Supreme Court, U. S.
FILED
FEB 20 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

(1)

October Term, 1944. No. 967

UNITED STATES OF AMERICA, Ex Rel., THEODORE ROOSEVELT POTTS,

Petitioner,

v.

ROBERT W. RABB, United States Marshal for the Middle District of Pennsylvania,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

WALTER BIDDLE SAUL,
Counsel for Petitioner.

SAUL, EWING, REMICK & HARRISON,
2301-17 Packard Building,
Philadelphia, Penna.

Eastern Bank Note Co., Phila., Pa.

TABLE OF CONTENTS OF PETITION.

	Page
A Summary Statement of the Matter Involved	1
Opinions of the Court Below	3
Jurisdiction	4
The Questions Presented	4
Reasons Relied on for the Issuance of the Writ	4
Position of the Court Below	8

APPENDIX.

	Page
Opinion in No. 160, U. S. District Court, Middle District of Pennsylvania (December 3, 1943)	9
Opinion in No. 8543, U. S. Circuit Court of Appeals, Third Circuit (February 14, 1944)	11
Opinion in No. 10984, U. S. District Court, Middle District of Pennsylvania (October 4, 1944)	15
Opinion in No. 10984, U. S. District Court, Middle District of Pennsylvania (October 4, 1944)	19
Opinion in No. 8543, U. S. Circuit Court of Appeals, Third Circuit (January 17, 1945)	21

AUTHORITIES.

	Page
Article 3, Sec. 2 of Constitution	4
Section 240, Judicial Code	4
28 U. S. Code Annotated, Sec. 347	4

148863

IN THE

Supreme Court of the United States.

October Term, 1944. No. .

UNITED STATES OF AMERICA, EX REL. THEODORE ROOSEVELT POTTS,
Petitioner,

v.

ROBERT W. RABB, UNITED STATES MARSHAL FOR THE MIDDLE DISTRICT OF PENNSYLVANIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit, entered in the above entitled case on January 17, 1945, and in accordance with the rules of your Honorable Court, sets forth and avers as follows:

A Summary Statement of the Matter Involved.

The petitioner Potts is claiming his constitutional right against arrest without reasonable cause, under the Fourth Amendment to the Constitution.

Potts was indicted by a United States Grand Jury, for the Middle District of Pennsylvania, sitting at Scranton, at the instance of the United States Attorney. The proceedings before the grand jury were secret and the petitioner was not given any hearing, either before the court or before a United States Commissioner.

Potts was notified by the United States Attorney to appear before a Judge for the District Court for the Middle District, sitting in Harrisburg. He did so appear and immediately demanded the protection of the Constitution against arrest without reasonable cause, and petitioned the court for a writ of habeas corpus. The District Court refused to grant the writ because the petitioner Potts was not then in the technical custody of the Marshal. A few moments after the refusal to grant the writ of habeas corpus the court issued a bench warrant for the petitioner's arrest. He was immediately arrested and taken into custody by the Marshal and while in the custody of the Marshal he filed a new petition for a writ of habeas corpus. The court denied the writ. Your petitioner, in order to avoid being taken to jail, entered bail and appealed the refusal of the District Court to grant the writ of habeas corpus to the Circuit Court of Appeals for the Third Circuit.

Your petitioner, in presenting this case to the judges of the Third Circuit, again demanded his constitutional rights under the Fourth Amendment. The Circuit Court of Appeals filed an opinion stating that the question of the petitioner's right to a writ of habeas corpus was moot because the defendant had been admitted to bail and on the question of his constitutional rights stated:

> "As we have stated the appellant has raised substantially the same objections to the sufficiency of the indictment in his motion to quash as he has in his petition for habeas corpus. His rights under the Fourth Amendment can be protected fully under the motion to quash. If there was no legally competent evidence before the grand jury which returned the indictment, that fact may be ascertained on the hearing of the motion. See in re Lancaster, 137 U. S. 393, 395; Brady v. U. S., 24 F. (2nd) 405, 407-408; Nanfito v. U. S., 20 F. (2nd) 377, 378; U. S. v. Rubin, 218 F. 245, 247-250.
>
> The appeal is dismissed as moot."

The petitioner Potts filed a petition for a writ of certiorari to your Honorable Court because he feared that the question of his rights under the Fourth Amendment could not be protected in the manner set forth in the said opinion of the Circuit Court as of October Term, 1943, No. 763.

Your Honorable Court refused to grant the writ on the 24th day of April, 1944.

Your petitioner thereupon attempted to avail himself of the remedy indicated by the Circuit Court of Appeals for the Third Circuit, and requested the District Court to permit him to secure from the records of the United States Attorney and the Marshal, the names of any witnesses who testified against him before the grand jury, for the purpose of enabling the petitioner Potts to show that such witnesses, if any, could not possibly have given any competent testimony against him.

The judge of the District Court for the Middle District refused to permit your petitioner to secure this information and thereupon dismissed the motion to quash the indictment for lack of any evidence to support the motion.

Your petitioner again appealed to the Circuit Court of Appeals for an order on the District Court in the form of an additional or supplemental mandate, in order that the petitioner might avail himself of the right which the Circuit Court of Appeals had stated the petitioner possessed.

The Circuit Court of Appeals, in an opinion filed January 17, 1945, denied your petitioner's motion and your petitioner is now left without any remedy of any kind save by application to your Honorable Court.

Opinions of the Court Below.

1. Opinion of Judge Watson, U. S. District Court for the Middle District of Pennsylvania, dated December 3, 1943, denying the application for a writ of habeas corpus.

2. Opinion of Judge Biggs, Circuit Court of Appeals for the Third Circuit, affirming the decision of Judge Wat-

son and setting forth the petitioner's rights respecting the Fourth Amendment.

3. Opinion of Judge Watson dated October 4, 1944, denying the petitioner's right to the names of witnesses who testified before the grand jury.

4. Opinion of Judge Watson dated October 4, 1944, dismissing the motion to quash the indictment.

5. Opinion of Judge Bard, Circuit Court of Appeals for the Third Circuit, dated January 17, 1945, dismissing the petitioner's petition for an additional mandate.

Jurisdiction.

The jurisdiction is founded on Article III, Sec. 2, of the Constitution, the question involved being the construction of the Fourth Amendment of the Constitution and a citizen's rights thereunder.

Section 240 of the Judicial Code; 28 U. S. Code Annotated, Sec. 347.

The Questions Presented.

1. Does a citizen of the United States, under the Fourth Amendment to the Constitution, have the right to demand that reasonable cause be shown for his arrest, before he can be taken into custody under a warrant, or before he can be compelled to stand trial?

2. Is an indictment found in secret by a grand jury, on the request of the United States Attorney, with or without evidence to support it, such reasonable cause as satisfies the Bill of Rights, or must the government show, when the right is claimed, that there is reasonable ground for the arrest?

Reasons Relied on for the Issuance of the Writ.

The petitioner Potts is claiming the substantial right which is afforded to him by the Fourth Amendment to the

Constitution—a right which protects him against arrest and necessarily against trial, unless probable cause be shown for the issuance of the warrant. The right that Potts claims is one of substance, not mere procedure. From the moment Potts was notified by the United States attorney that a bill of indictment had been found against him by a grand jury, he demanded his constitutional protection and at every stage of the proceeding he insisted that there be publicly shown, before some judicial tribunal, reasonable cause for the issuance of the warrant.

The petitioner Potts has been consistently refused this right and as a result of procedural decisions in the court below is now, unless the appeal to this court prevails, effectively deprived of his constitutional right and will be forced to stand trial without ever having an opportunity of proving (if the burden of proof be on him) that there was no reasonable cause for his arrest and trial.

The Bill of Rights contains matters of substance. The particular form of any procedure is unimportant so long as the substance of the right is preserved.

Whether a person accused of crime is indicted in the first instance by the grand jury, or arrested on a warrant and given a hearing before a committing magistrate or United States Commissioner, is entirely immaterial, so long as at some stage in the proceeding, before the defendant is forced to stand trial, he has the right to demand compliance with the constitutional guarantee that probable cause must be shown. That probable cause must be shown, under our form of government, publicly and before a judicial tribunal.

In so far as the constitutional guarantee is concerned, the right depends on the actual open presentation of the evidence, not the place or form where and how it is shown.

The petitioner Potts has no desire to violate the secrecy surrounding the grand jury and no desire to attempt to secure the government's evidence prior to trial. His only request is and his only claim of right is that there be

publicly shown, before a judicial tribunal, some evidence amounting to probable cause for his arrest and trial. It is immaterial to the petitioner Potts whether that evidence was presented before the grand jury or not. His claim is that no such evidence exists and cannot exist and that therefore he is protected against arrest and trial by the constitution, unless some evidence against him be publicly disclosed.

The procedural decisions of the District Court and the Circuit Court of Appeals have forced the petitioner Potts into the position of attempting to protect his right on a motion to quash the indictment. The Circuit Court of Appeals, on the appeal from the court below from the refusal of the District Court to grant a writ of habeas corpus, stated:

> "As we have stated the appellant has raised substantially the same objections to the sufficiency of the indictment in his motion to quash as he has in his petition for habeas corpus. His rights under the Fourth Amendment can be protected fully under the motion to quash. If there was no legally competent evidence before the grand jury which returned the indictment, that fact may be ascertained on the hearing of the motion. See in re Lancaster, 137 U. S. 393, 395; Brady v. U. S., 24 F. (2nd) 405, 407-408; Nanfito v. U. S., 20 F. (2nd) 377, 378; U. S. v. Rubin, 218 F. 345, 247-250.
>
> The appeal is dismissed as moot."

The petitioner Potts reiterates that he is claiming a substantial right without reference to procedure and that had an opportunity been afforded him to protect his right on a motion to quash, his constitutional guarantee would have been satisfied. Unfortunately, when your petitioner Potts attempted, in the District Court, to show that there was no probable cause for his arrest he was met with all of the technical rules of procedure surrounding the introduction of testimony applicable to an ordinary motion to

quash. He requested that he be given the names of the witnesses, if any, who supposedly testified against him before the grand jury, with the statement that if those names were given, he would then, by evidence, show that any such witnesses could not possibly have given any competent testimony against him. The names were refused and the motion to quash was denied, because of the failure of Potts to introduce any testimony that would justify the quashing of the indictment.

The Circuit Court of Appeals, on a motion made by the petitioner Potts to issue a supplemental mandate to the District Court to permit Potts to do the thing which the Circuit Court of Appeals said he had the right to do, to wit, protect his rights under the Fourth Amendment, on the motion to quash, refused relief.

The petitioner Potts is now in the position of being forced to trial unless relief is granted by your Honorable Court, without any reasonable cause having been shown at any stage of this proceeding, for his arrest and trial, and in spite of his demand for the protection of his rights under the Fourth Amendment at every stage of the proceeding. This denial is the result of the refusal of the court to recognize that the constitutional guarantees of the Bill of Rights are beyond and above mere matters of procedure.

Rights are valuable only when available. If a constitutional guarantee is beyond the plain, easy grasp of a citizen needing protection, the guarantee is worthless. The principles of the Bill of Rights stand alone and self-contained; alone and self-contained in that their outlines cannot be blurred by being tied to old time abuses or softened by some new supposed good. There is no compromise possible. They are, or they are not.

If it be the law that the United States attorney can secure the arrest and trial of a citizen by securing an indictment in secret from a grand jury and the citizen cannot demand that reasonable cause be publicly shown for such action, then surely some not unsubstantial portion of our liberty has been lost.

Position of the Court Below.

Neither the District Court nor the Circuit Court has been willing either to deny outright that the plaintiff has any rights under the Fourth Amendment in connection with the so-called United States Attorney's Bill, or on the other hand, neither court has been willing to grant the petitioner the right which he claims.

It is respectfully submitted that the petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals be granted.

And your petitioner will ever pray, etc.

WALTER BIDDLE SAUL,
Counsel for Petitioner.

SAUL, EWING, REMICK & HARRISON.

COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF PHILADELPHIA :ss

WALTER BIDDLE SAUL, being duly sworn according to law, deposes and says that he is the attorney for Theodore Roosevelt Potts, the petitioner, and that the facts set forth in the foregoing petition are true.

Sworn to and subscribed :
before me this 16th day : Walter Biddle Saul
of February 1945 :

L. C. Sturtevant
(Seal) Notary Public
My Commission Expires
Feb. 26, 1947